

BRB No. 92-1363

WATSON PIERCE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:_____
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney's Fees and the Additional Supplemental Decision and Order - Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Supplemental Decision and Order - Awarding Attorney's Fees and the Additional Supplemental Decision and Order - Awarding Attorney's Fees (88-LHC-1289) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ The amount of an attorney's fee award is discretionary and

will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock,*

¹By Order dated June 3, 1992, the Board granted claimant's motion to dismiss his cross-appeal in the instant case. BRB No. 92-1363A.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Inc., 12 BRBS 272 (1980).

This case is before the Board for the second time. Claimant worked as a welder for employer from 1964 to 1973. On December 27, 1986, claimant underwent an audiometric evaluation which revealed a 31.8 percent binaural impairment. Thereafter, on January 13, 1987, claimant filed a claim for compensation under the Act for a work-related hearing loss and provided employer with notice of his injury that same day. A second audiogram was performed on July 16, 1987, which was interpreted as indicating a noise-induced hearing loss of 26.25 percent. Employer voluntarily paid benefits under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13) (1988), for a 26.25 percent binaural impairment on January 13, 1988. On February 9, 1988, employer modified its payment of benefits to claimant, contending that claimant is entitled to compensation under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988). Thus, employer suspended its voluntary payments to claimant, noting that, based upon its prior payments of compensation under Section 8(c)(13), no additional compensation was due claimant until April 18, 1989. On February 11, 1989, this case was referred to the Office of Administrative Law Judges for a formal hearing.

Before the administrative law judge, each party moved for summary judgment, contending that the sole issue to be presented for formal adjudication was whether claimant, a retiree, is entitled to compensation under Section 8(c)(13) or Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(13), (23)(1988). In a Decision and Order Granting Claimant's Motion for Summary Decision, the administrative law judge found that claimant's benefits should be calculated pursuant to Section 8(c)(13) of the Act, and remanded the case to the district director for the entry of the appropriate order. Thereafter, claimant appealed the district director's denial of penalties pursuant to Section 14(e), 33 U.S.C. §914(e), of the Act, and employer cross-appealed the administrative law judge's award of benefits pursuant to Section 8(c)(13), to the Board.

Subsequently, claimant's counsel filed a fee petition for work performed before the administrative law judge, in which he requested \$950, representing 9.5 hours of services at \$100 per hour, plus \$18.75 in expenses. Employer filed objections to counsel's fee request. In a Supplemental Decision and Order - Awarding Attorney's Fees, the administrative law judge, after denying the expenses sought, found employer liable for the requested fee. Thereafter, in an Additional Supplemental Decision and Order - Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel \$100, representing one hour of time spent in replying to employer's objections, at a rate of \$100 per hour. Employer timely filed a Supplemental Notice of Appeal of the fee award, which the Board consolidated with employer's cross-appeal.

In an Order dated September 30, 1991, the Board vacated both the administrative law judge's determination that claimant's benefits should be calculated pursuant to Section 8(c)(13) and his award of an attorney's fee payable by employer, and remanded the case to the administrative law judge for reconsideration in accordance with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). The Board additionally instructed the administrative law judge on remand to consider the applicability of Section 14(e) to the case. *Pierce v. Ingalls Shipbuilding, Inc.*, BRB

Nos. 89-0286/A (September 30, 1991)(Order)(unpublished).

On remand, the parties agreed to average the results of the December 27, 1986, and the July 16, 1987, audiometric evaluations. In his Decision and Order on Remand, the administrative law judge accepted this agreement and, relying on *Ingalls Shipbuilding*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), awarded claimant ongoing weekly compensation benefits of \$20.18 pursuant to Section 8(c)(23).² Next, the administrative law judge determined that employer is liable for an assessment under Section 14(e) of the Act. Lastly, after considering the issues before him, the administrative law judge reinstated his prior award of an attorney's fee to claimant's counsel in the amount of \$1,050, payable by employer.

On appeal, employer contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since, because it accepted liability for the claim and commenced voluntary payments of compensation to claimant prior to receiving formal notice from the district director's office, there was no successful prosecution of the claim. In the alternative, employer argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel by the administrative law judge is excessive since any fee should be based upon the difference between the amount employer voluntarily paid to claimant and the amount awarded by the administrative law judge.³ Claimant responds, urging affirmance of the fee award.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. *See* 33 U.S.C. §928(a). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b). *See, e.g., Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Initially, we need not address employer's arguments with respect to liability under Section 28(a), inasmuch as the present case is governed by Section 28(b). Although employer did initiate voluntary payments of compensation to claimant, it continued to dispute claimant's entitlement to a Section 14(e) assessment. Thus, a controversy remained even after employer voluntarily paid compensation. As claimant was ultimately successful in establishing his right to a Section 14(e) assessment over employer's objections, this additional compensation is sufficient to support an

²No one challenges the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23). *Cf. Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(all hearing loss is properly compensated under 33 U.S.C. §908(c)(13)).

³We note that on appeal employer incorporates by reference its objections raised before the administrative law judge.

award of an attorney's fee payable by employer pursuant to Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand); *Smelcer v. National Steel & Shipbuilding Co.*, 16 BRBS 117 (1984).

Next, we reject employer's contention that the fee award is excessive. Employer's contention that pursuant to Section 28(b) the fee awarded should be based solely on the difference between the amount of benefits awarded and the amount of benefits tendered must fail. The administrative law judge properly rejected this contention; specifically, the administrative law judge, while acknowledging that this was a factor to consider, found that an attorney's fee is not limited by the amount of compensation gained as there are other factors, such as risk of loss, which must also be taken into consideration when awarding a fee.⁴ *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993).

Employer next contends that the lack of complexity of the instant case mandates a reduction in the amount of the attorney's fee awarded by the administrative law judge. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Thus, the complexity of the legal issues is but one factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in finding reasonable counsel's requested hourly rate of \$100. We therefore reject employer's contention that the awarded fee must be further reduced on this basis. Moreover, we reject employer's contention that the awarded hourly rate does not conform to the reasonable and customary charges in the area where the claim arose. Employer's mere assertion in this regard is insufficient to meet its burden of proving that the awarded hourly rate is excessive; we therefore affirm the rate awarded to counsel by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer additionally challenges the number of hours requested by claimant's counsel's and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge specifically determined that the hours requested by claimant's counsel were reasonable and necessary. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

⁴Moreover, the Board has consistently rejected employer's contention that the amount of the fee awarded under Section 28(b) must be limited to the difference between the amount of benefits awarded and the amount previously tendered. *See, e.g., Hoda v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 88-3187/A (August 12, 1994)(Decision and Order on Reconsideration)(McGranery, J., dissenting).

Lastly, in awarding claimant's counsel an attorney's fee, the administrative law judge viewed counsel's billing method as permissible. For the reasons stated in *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), we hold that the administrative law judge acted within his discretion in doing so.⁵

Claimant's counsel has submitted a fee petition for work performed before the Board regarding his initial appeal, BRB No. 89-0286, requesting a fee of \$625, representing 5 hours of services rendered at a rate of \$125 per hour, plus \$9.00 in expenses. Employer objects to the request, arguing that the number of hours expended and the hourly rate are excessive for the region where the case was tried because this is a routine case that did not raise novel issues.

Because claimant was ultimately successful in both prosecuting his appeal and in obtaining greater compensation on remand, counsel is entitled to a fee reasonably commensurate with the necessary work performed before the Board. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). After a review of counsel's fee petition and employer's objections thereto, we find the number of hours requested by counsel, the hourly rate sought, and expenses requested to be reasonably commensurate with the necessary work

⁵We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, Nos. 89-4459, 89-4468, 89-4469 (5th Cir. July 25, 1990)(unpublished) and fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (Sept. 5, 1991), mandates a different result in this case. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

done.⁶ *See* 20 C.F.R. §802.203. We therefore award counsel a fee of \$625, representing 5 hours of services rendered at an hourly rate of \$125, and \$9.00 in expenses, payable by employer.

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fees and Additional Supplemental Decision and Order - Awarding Attorney's Fees are affirmed. Claimant's counsel is awarded an attorney's fee of \$625, and \$9.00 in expenses, for work performed before the Board in BRB No. 89-0286, to be paid directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

⁶We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee requested in the instant case is unreasonable.